**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**KAREN A. COLES,**

**Plaintiff,**

**v.**

**Civil Action No. 01-732 (JMF)**

**STEPHEN A. PERRY,**

**Administrator, General Services Administration,**

**Defendant.**

**MEMORANDUM OPINION**

Discovery in this case has closed. The defendant has now learned that a potential witness, Patricia Van Gilder, has been called to active military duty in Saudi Arabia. Defendant seeks to take Van Gilder's deposition *de bene esse*.

Defendant did not list Van Gilder in his initial disclosure but plaintiff did. Despite the close of discovery, defendant filed a supplement to his initial disclosures "by including in its disclosure of individuals with knowledge those identified by plaintiff on her list of disclosures." Supplement to Defendant's Initial Disclosures (Filed June 1, 2002). In other words, after discovery closed, defendant has incorporated by reference every one named in plaintiff's initial disclosure in his "initial" disclosure. According to the defendant, this eliminates any objection to the taking of Van Gilder's deposition. I am afraid that I cannot read the Federal Rules of Civil Procedure to permit the deposition.

The difference between the 1993 rule pertaining to initial disclosures and the amendment that took effect on December 1, 2001 is subtle but telling. As of 1994, Fed. R. Civ. 26(a)(1)(A) required each party to provide to her opponent the name of "each individual likely to have discoverable information." See Charles Alan Wright, Arthur R. Miller & Richard L. Marcus , 8 Federal Practice and Procedure at 10 (1994). Now, however, a party must disclose the name of any individual "likely to have discoverable information that the disclosing party may use to support its claims or defenses . . . " Fed. R. Civ. P. 26(a)(1)(A). The significant difference is that now the party is obliged to make the explicit representation that it is likely that she may rely on the potential testimony of the individual named.

Defendant does not claim that he ever advised plaintiff that Van Gilder had information that the defendant might use to support its defenses. Instead, defendant filed recently a document that purported to supplement his initial disclosure by incorporating by reference all of the persons listed in plaintiff's initial disclosure and its supplements. In other words, as defendant has it, he may glibly state that all of the people ever named by plaintiff as having information that plaintiff may use to support her claims are as likely to have information that will support the defendant's defense. The court is apparently to swallow that insincere morsel without blanching and find it compliant with a rule obviously designed to force parties to advise their opponents truthfully of those persons who they expect realistically to advance their cases.

I am, to put it mildly, unwilling to read this new rule to permit substituting insincere boilerplate for a conscientious evaluation of whether a person is truly likely to help one's case. In my vew, the rule will truly advance its drafters' intent if it is read to preclude a party from evading that evaluation by the

clever stratagem of waiting until discovery had ended and then springing on one's opponent the remarkably insincere statement that the individuals are on your list are just as likely to support my case as yours. While such a case could be conjured up, it will, in my view, be the first one in human history. I want to read the rule to encourage lawyers to keep each other advised as discovery proceeds of whether they now believe witnesses on their opponents' list may actually provide testimony helpful to their cases. I hope, thereby, to help them use limited discovery resources, such as a restricted number of depositions, most effectively. If I let them wait until discovery closes and then permit them to glibly state that it is as likely that the individuals on their opponents' list will support their case as their opponents' I am encouraging them to substitute gamesmanship for a conscientious effort to comply with their disclosure responsibilities.

Fed. R. Civ. 37(c), designed to be self-executing, [1] requires a court to preclude the use of evidence from a witness not identified in a party 's 26(b)(a)(1) statement if the failure was without justification and the exclusion is not harmless. Defendant has not offered any justification for its not supplementing its initial disclosure. If one accepts, as I do, that the rules contemplate forcing a party to disclose its potential witness either initially or as discovery proceeds so that the opposing party can best determine how to use its limited discovery resources, then learning that a party will rely on the testimony of a witness after discovery closes will usually be harmful. It certainly has been harmful here. Defendant offers plaintiff the choice of taking Van Gilder's deposition before the deposition de bene esse. But, the discovery itself may be admissible at trial if Van Gilder is still in Saudia Arabia. Since plaintiff preserves

[1] Fed R. Civ. P. advisory committee's notes (1993 amendments).

Van Gilder's testimony by taking the "discovery" deposition, the choice the defendant gives her is one Mr. Hobson would have favored.

I note that at this point I am only precluding the deposition *de bene esse*. Whether defendant can rely upon an affidavit from Van Gilder in support of his motion for summary judgment or call her as a witness at trial if she returns from Saudia Arabia in time are questions I am not deciding at this time.

An Order accompanies this Memorandum.

_____
JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

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**STEPHEN A. PERRY,**

**Administrator, General Services Administration,**

**Defendant.**

**ORDER**

**IT IS ORDERED THAT** plaintiff's Motion for a Protective Order [ # 31 ] is granted and that defendant's Emergency Motion to Take Deposition on Monday, June 10, 3002 [#34] is denied.

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JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: